CHEN YUE KIEW

v.

ANGKASAMAS SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD NOOR AHMAD JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: A-02-271-1999]
6 AUGUST 2003

CIVIL PROCEDURE: *Appeal - Decision of trial judge - Whether trial judge arrived at decision without affording parties opportunity to make submissions - Whether a serious breach of rules of procedure - Rules of the High Court 1980, O. 35 r. 4*

CIVIL PROCEDURE: *Appeal - Discretion exercised by trial judge - Whether trial judge failed to consider relevant issues in reaching decision - Whether trial judge had erred - Whether appellant suffered injustice*

LAND LAW: *Trespass - Building - Encroachment on land - Doors, windows and edge of roof of appellant's shop-house protruded into respondent's land - Whether landowner entitled to exclusive use of his land and airspace above it - Whether protrusions were trivial in nature and did not inconvenience respondent*

The appellant had constructed a double-storey shop-house on her land; the doors, windows and the edge of the roof of the said shop-house protruded into the respondent's land. The appellant then discovered that the respondent had entered its land with the intention of constructing a double-storey shop-house thereon. The appellant, fearing that the said construction may result in the appellant having to carry out remedial work to her shop-house because of the protrusions alluded to earlier, filed an action to prevent as such from occurring. The respondent then filed its defence and counter-claim, and the learned judge granted the counter-claim.

The appellant, in appealing against the decision, contended that: (1) the learned judge arrived at his decision without affording the parties the opportunity to make their submissions, and this constituted a serious breach of the rules of procedure as contained in O. 35 r. 4 of the Rules of the High Court 1980; (2) the learned judge failed to take into consideration, in

the exercise of his discretion, that the relief sought by the respondent did not serve any useful purpose as it concerned the right of the respondent to build on its land in accordance with a plan which was yet to be approved by the Majlis Bandaraya Ipoh ('MBI'); and (3) the protrusions were *de minimis* in nature and that the respondent had suffered no damage or inconvenience, but only enjoyed a limited benefit from the removal of the protrusions, whilst the appellant would incur much cost and inconvenience.

Held:
Per Arifin Zakaria JCA

[1] A mere infraction of the rules of procedure does not necessarily warrant appellate interference unless it can be shown that such non-compliance had occasioned a miscarriage of justice. An appeal before this court is by way of rehearing; therefore, the appellant was free to make her submission before this court. On that premise, the appellant had in no way been prejudiced by the mere failure of the learned judge to call upon the parties to make their submissions. (p 786 f-g)

[2] A landowner is entitled to exclusive use of his land and the airspace above it, and the court would not hesitate to grant a perpetual injunction against anyone trespassing into the land of another or into the airspace above it. The mere fact that the respondent was not asking for immediate removal of the objects protruding into its land – until the respondent's building plan received approval from MBI – could not be a cause for complaint. If the learned judge had committed any error in making such an order, it leant in favour of the appellant and, in the circumstances therefore, no injustice had been occasioned to the appellant. (p 789 c-d)

[3] The evidence of the respondent's witness ('DW1') that they could not commence building the shop-house because of the protrusions stood unchallenged before the court. Therefore, it was not exactly correct to say that the protrusions were of a trivial nature and that the appellant should not be put to expense and trouble to remedy the same. In any event, the appellant had not called any evidence in support of her case; hence, this final ground of appeal must also fail. (pp 789 g-h & 790 a)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu telah membina sebuah rumah kedai bertingkat dua di atas tanahnya; pintu, tingkap dan hujung bumbung rumah kedai tersebut terjulur di atas tanah responden. Perayu kemudian dapat tahu bahawa responden telah memasuki tanahnya dengan tujuan membina sebuah rumah kedai bertingkat dua atasnya. Perayu, cemas kerana pembinaan tersebut mungkin akan mengakibatkan perayu terpaksa melakukan kerja pemulihan kepada rumah kedainya disebabkan kejuluran tersebut, memfail tindakan untuk menghalang sebegitu daripada berlaku. Responden pula memfail pembelaan dan tuntutan balasnya, dan hakim yang arif telah membenarkan tuntutan balas tersebut.

Perayu, dalam merayu terhadap keputusan tersebut, mengadu bahawa: (1) hakim yang arif telah mencapai keputusannya tanpa memberi peluang kepada parti-parti untuk membuat hujahan, dan ini adalah perlanggaran serius kaedah-kaedah prosedur yang terkandung di dalam A. 35 k. 4 Kaedah-kaedah Mahkamah Tinggi 1980; (2) hakim yang arif telah gagal mempertimbangkan, semasa menggunakan budi bicaranya, bahawa relief yang dituntut oleh responden tidak berguna kerana ia berhubungan dengan hak responden membina di atas tanahnya mengikuti suatu pelan yang belum lagi diluluskan oleh Majlis Bandaraya Ipoh ('MBI'); dan (3) kejuluran tersebut bersifat *de minimis* dan responden tidak mengalami kerugian atau kesusahan, dan akan hanya menikmati faedah yang sedikit dari pembuangan kejuluran tersebut berbanding dengan perayu yang akan menanggung banyak kos dan kesusahan.

Diputuskan:
Oleh Arifin Zakaria HMR

[1] Suatu perlanggaran kaedah-kaedah prosedur yang teramat kecil tidak memerlukan penyemakan semula sehingga ia boleh ditunjukkan bahawa ketidakpatuhan tersebut telah menyebabkan salah laksana keadilan. Suatu rayuan kepada mahkamah ini adalah secara pendengaran semula; oleh itu, perayu adalah bebas untuk membuat hujahannya kepada mahkamah ini. Berdasarkan itu, perayu tidak mengalami apa-apa prejudis disebabkan kegagalan hakim yang arif memanggil parti-parti membuat hujahan mereka.

[2] Tuan punya tanah berhak kepada pengunaan eksklusif tanahnya dan raung udara di atasnya, dan mahkamah tidak teragak-agak untuk memberi injunksi berkekalan terhadap sesiapa yang menceroboh ke dalam tanah orang lain atau ruang udara di atasnya. Walaupun

responden tidak meminta pembuangan segera benda-benda yang terlujur di atas tanahnya – sehingga pelan pembinaan responden diluluskan oleh MBI – tidak menjadi suatu kausa aduan. Jikalau hakim yang arif telah membuat apa-apa kesilapan apabila membuat perintah itu, ia lebih berpihak kepada perayu dan, dalam keadaan sebegitu, tiada ketidakadilan terhadap perayu.

[3] Keterangan saksi responden ('DWI') bahawa mereka tidak boleh memulakan pembinaan kerana kelujuran tersebut tidak dibantah di mahkamah. Oleh itu, ia bukan tepat sangat untuk berkata bahawa kelujuran tersebut hanya bersifat remeh-temeh dan perayu tidak patut menanggung perbelanjaan dan kesusahan untuk memulihkan kelujuran tersebut. Walau apa pun, perayu tidak menunjukkan apa-apa keterangan yang menyokong kesnya; oleh itu, alasan rayuan terakhir ini pun mesti gagal.

Rayuan ditolak.]

Case(s) referred to:
Karuppannan Chellapan v. Balakrishnan Subban [1994] 4 CLJ 479 FC ***(foll)***
Mellstrom v. Garner & Ors [1970] 1 All ER 9 ***(dist)***
Ng Yee Fong & Anor v. EW Talalla [1986] 1 MLJ 25 FC ***(foll)***
Vasudevan v. T Damodaran & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Legislation referred to:
National Land Code, s. 44(1)(a)
Rules of the High Court 1980, O. 35 r. 4
Specific Relief Act 1950, s. 41

For the appellant - Norazali Nordin; M/s Chan & Assoc
For the respondent - Lee Pooi Mun; M/s Khong & Son

[Appeal from High Court, Ipoh; Civil Suit No: 22-87-1997]

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria JCA:

Background Facts

This is an appeal by the appellant/plaintiff against the decision of the learned judge in allowing the respondent/2nd defendant's counter claim. The facts leading to the counter claim are not in contention and may briefly be stated as follows. The appellant is the registered proprietor of land known as Lot 684, Kampung Baru, Gunung Rapat, Mukim Hulu Kinta, Perak ("the appellant's land"). The appellant's land adjoins the land referred to as H.S.(M) UK 5107, No. P.T. 138041, Kampung Baharu, Gunung Rapat, Mukim Hulu Kinta, Perak ("the respondent's land"), which is presently registered in the name of the respondent. The appellant had constructed a double storey shophouse on the appellant's land. It is conceded that the doors and windows and the edge of the roof of the said shophouse on the appellant's land protruded into the respondent's land. It is also not in a dispute that at the time when the approval for the construction of the shophouse was obtained from the Majlis Bandaraya Ipoh ("MBI"), the 1st defendant in the court below, the respondent's land is yet to be alienated to the 3rd defendant in the court below ("the respondent's predecessor-in-title"). Some time around June 1997 the appellant discovered that the respondent had entered into the respondent's land with the intention of constructing a double storey shop house thereon. The appellant feared that the said construction work may result in the appellant having to carry out remedial work to her shophouse because of the protusions adverted to earlier. The appellant then commenced this action. The respondent then filed its defence and counter claim. On the respondent's application the appellant's action was struck out by the learned judge on 3 April 1998. The appellant appealed against the said order. The appeal is currently pending before this court.

On 1 March 1999, the counter claim came up for hearing before the learned judge and an order in terms of prayers 1 and 3 of the counter claim (with modifications) was granted by the learned judge. The appellant is dissatisfied with the said order and hence this appeal. On 10 February 2003 this appeal came up for hearing before us and after having heard submissions of both parties we dismissed the appeal with costs. We now give our reasons.

The Grounds Of Appeal

Three principal grounds were advanced by the appellant in support of this appeal. We will consider each of the these grounds in the order they were raised before us. The first complaint by the appellant was that the learned judge arrived at his decision without affording the parties the opportunity to make their submissions. The note of proceedings before the learned judge with regard to the counter claim by the respondent reveals that only one witness was called to give evidence on behalf of the respondent. The appellant did not call any witness. At the close of the appellant's case the learned judge then made the following orders:

> Prayer 1: OIT
>
> Prayer 2: Plaintiff to remove all structures encroaching into the 2nd defendant's land if the Majlis Bandaraya approves the building plan for the 2nd defendant to build on the land.

From the note of proceedings it is true that at the close of the appellant's case the learned judge did not call the respective parties to make their submissions. The learned counsel for the appellant contended that this constitutes a serious breach of the rules of procedure as contained in O. 35 r. 4 of the Rules of the High Court 1980 ("the RHC") (which relates to the order of speeches at the trial).

Having considered the arguments of both counsel for the appellant and the respondent we are in agreement with the submission of the learned counsel for the respondent that mere infraction of the rules of procedure does not necessarily warrant an appellate interference unless it can be shown that such non compliance had occasioned a miscarriage of justice. We would stress that an appeal before us is by way of rehearing, the appellant is, therefore, free to make her submission before us. On that premise we are of the view that the appellant had in no way been prejudiced by the mere failure of the learned judge to call upon the parties to make their submissions. Of course as a matter of prudence, judges should call upon parties to make their submissions as this would a great deal assist them in arriving at their decision.

For the above reasons we would dismiss the first ground advanced by the appellant. We now turn to consider the principal issue in this appeal, that is, whether the learned judge had acted on correct principle in granting the orders which are now under appeal. In the counter claim the respondent sought a number of declaratory reliefs against the appellant. The power of the court to grant declaratory relief is governed by s. 41 of the Specific

Relief Act 1950. It is a discretionary power. It is not an unfettered discretion it must be based on correct principles. It is subject to review by the appellate court. However, this power of review by the appellate court is highly circumscribed. This is well stated in the following passage of the judgment of Abdoolcader J (as he then was) in *Vasudevan v. T. Damodaran & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101:

> There is a catenation of cases on this point and will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as a mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenon & Co. v. Johnson* at page 148 per Lord Wright). The Privy Council held in *Ratnam v. Cumarasamy & Anor*, that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v. Bartlam.*

The complaint by the appellant in this present case is that the learned judge failed to take into consideration, in the exercise of his discretion, that the relief sought for by the respondent does not serve any useful purpose as it concerns the right of the respondent to build on its land in accordance with a plan which is yet to be approved by MBI. In support the learned counsel relied upon the English case of *Mellstrom v. Garner & Ors.* [1970] 1 All ER 9. With respect, after considering the facts and the declaration sought for in that case we are of the view it is not all applicable to the present case. In the present case the claim by the respondent is premised on trespass simpliciter by the appellant on the respondent's land or the air-space above it and that alone in our view is sufficient ground for the respondent to maintain an action for trespass against the appellant. For support we would refer to the decision of the Federal Court in *Ng Yee Fong & Anor v. E.W. Talalla* [1986] 1 MLJ 25, where Mohamed Azmi SCJ in delivering the judgement of the court stated thus:

> As a matter of law, it cannot be disputed that a proprietor who establishes a proprietary right is *ex debito justitiae* entitled to an injunction unless it can be said against him that he has raised such an equity that it is no longer open to him to assert his legal or proprietary title. Further as stated at page 30 in *Kerr on Injunction* (6th edition).

> After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong unless there can be something special in the circumstances of the case, such as laches or where the interference with the plaintiffs right is trivial.

> The onus is therefore on the appellants to establish that there is something special in the circumstances of the present case why the learned trial judge ought not to have granted the injunction in favour of the respondent.

In the present case it is not disputed that the respondent is the registered owner of the respondent's land and as such the respondent is entitled to all such rights as defined in s. 44(1)(a) of the National Land Code which provides as follows:

> 44(1) Subject to the provisions of this Act and of any other written law for the time being in force, any person or body to whom (under this Act or a previous land law) land has been alienated, reserved land has been leased or a temporary occupation licence (including a licence so styled under a previous land law) has been granted in respect of any land, shall be entitled to:
>
> (a) the exclusive use and enjoyment of so much of the column of air-space above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment of the land.

The protrusions into the respondent's land by the appellant may look trivial in the eyes of the appellant; nevertheless it could not be denied that they constitute a clear breach of the respondent's right to the exclusive use and enjoyment of his land. In *Karuppannan v. Balakrishnan (Chong Lee Chun & Ors., third parties)* [1994] 4 CLJ 479, the Federal Court was faced with somewhat similar issue. There the appellant's predecessor-in-title had applied for permission to build side windows protruding into Lot 25 – for aesthetic value and undertook to remove them so they would not obstruct the construction of any building on Lot 25 which was then still vacant. Her application was approved on condition that the protrusion had to be removed the moment the registered owner of Lot 25 intended to build on it. The respondent asked the appellant to remove the protrusion and the appellant refused to comply. The respondent also alleged trespass against the appellant for constructing side exit, sewerage system, manholes and septic tank. The respondent's application for an interlocutory mandatory injunction was granted by the High Court and on appeal, the Federal Court affirmed the decision of the High Court. The Federal Court in its judgment stated in

that in the circumstances of that case an interlocutory mandatory injunction was appropriate and necessary remedy eventhough it gave the whole remedy asked for in the action. At p. 487 it observed as follows:

> As we have said, in the case of a trespass to land and airspace committed by the owner of an adjacent lot as serious as in this case, the aggrieved owner of the lot upon which trespass is committed is entitled to an interlocutory mandatory injunction by which to have the source of the trespass removed notwithstanding that the source of the trespass had already been in existence before the new owner came to own the land and whether or not he knew or had notice of it.

What we can draw from the abovecited authority is that a land owner is entitled to exclusive use of his land and the air-space above it and that the court would not hesitate to grant perpetual injunction against anyone trespassing into the land of another or into the air-space above it. The mere fact that the respondent is not asking for immediate removal of the objects protruding into its land, not until the approval of the respondent's building plan by MBI, could not in our view be a cause for complaint. In our view if any error had been committed by the learned judge in making such an order we think it leans in favour of appellant and in the circumstances, therefore, we see no injustice had been occasioned to the appellant.

The appellant further contended that the learned judge erred in arriving at his decision by failing to take into consideration the following factors namely:

(i) the protrusions are *de minimis* in nature;

(ii) the respondent has suffered no damage or inconvenience; and,

(iii) the respondent will enjoy only a limited benefit from the removal of the protrusions whilst the appellant would incur much time, cost and inconvenience.

As against that contention we have the evidence of DW1 for the respondent which clearly stated that:

> Because of the protrusions – we cannot build. At the moment we do not suffer any inconvenience on the protrusions. No direct damage to us until we are allowed to build.

This evidence of DW1 stands unchallenged before the court. Therefore it is not exactly correct to say that the protrusions are of a trivial nature and for that reason the appellant should not be put to expense and trouble to remedy the same. In any event the appellant had not called any evidence in support of her case. For the above reasons we find that this final ground of appeal advanced by the appellant must also fail.

The Result

For the reasons given above we find no apparent flaw in the decision of the learned judge and we, therefore, dismissed the appeal herein with costs. We further ordered that the deposit be paid to the respondent towards account of taxed costs.